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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

W. H. GARRETT,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

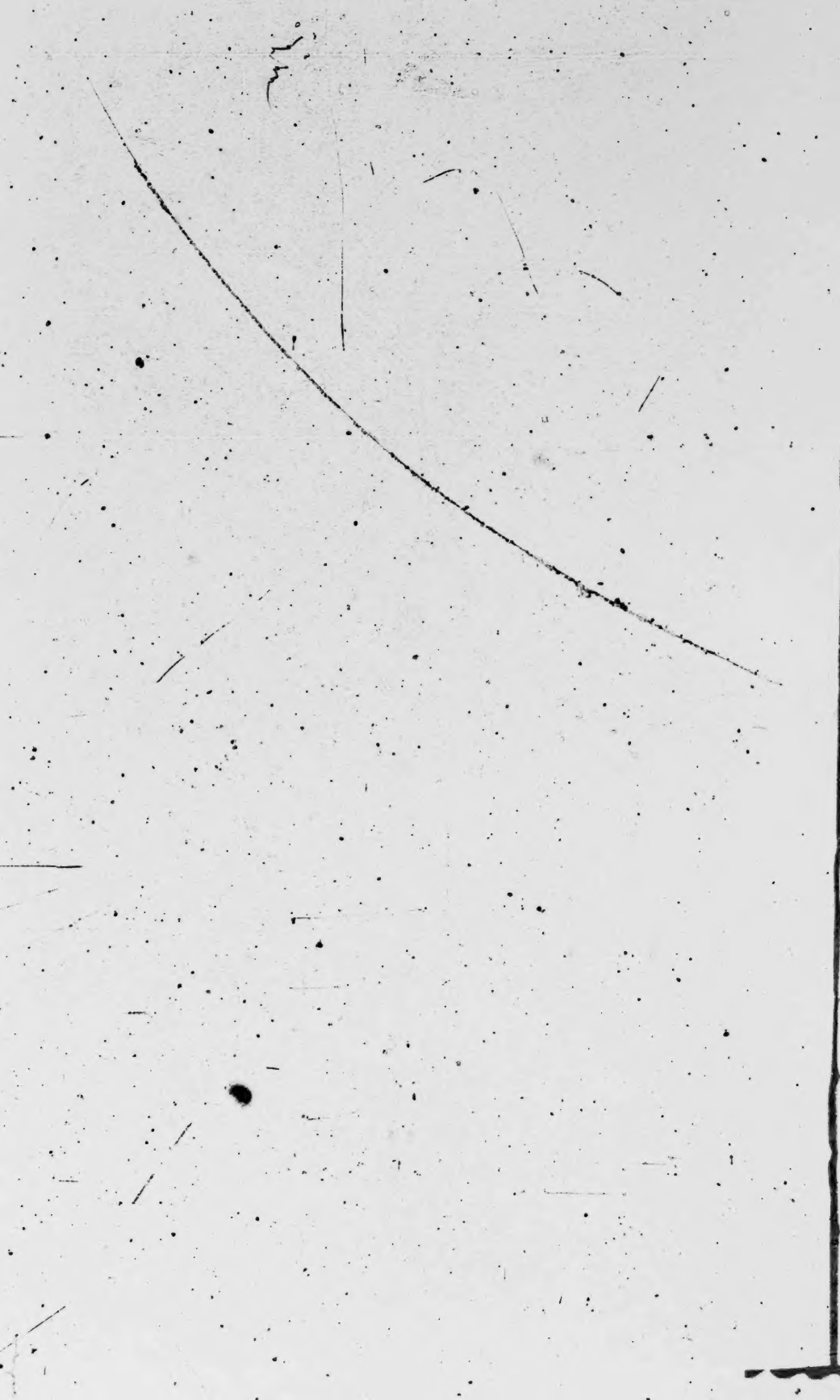
No. [redacted] 47

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

CLYDE W. KEY,
Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.



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Respondent.
No. 1007.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

I.

STATEMENT OF THE CASE.

Petitioner, an employee of Lenoir Car Works, a Tennessee manufacturing corporation, seeks damages of respondent, Southern Railway Company, an interstate carrier by rail, under the Federal Employers' Liability Act (45 U.

S. C., 51), for injuries sustained in the course of his employment, alleging that the separate corporate entity of Lenoir Car Works should be disregarded and petitioner treated as an employee of respondent on the two-fold grounds (1) that respondent, as the owner of all the capital stock of Lenoir Car Works, had reduced Lenoir Car Works to the status of an alter ego, adjunct, subsidiary, agent or instrumentality of respondent, and (2) that respondent had exercised such dominion and control over Lenoir Car Works as to make the employees of the latter in reality the employees of respondent.

After a trial to the Court without the intervention of a jury, the District Court, in an opinion at **173 Federal Supplement 915** made elaborate findings of fact, none of which was questioned in the Court of Appeals or here, and concluded that petitioner was not entitled to proceed against respondent under the Federal Act, but that his remedy was against Lenoir Car Works under the Tennessee Workmen's Compensation Law (Section 50-901, et seq., Tennessee Code Annotated).

The Court of Appeals affirmed in an opinion not yet reported.

ARGUMENT.

None of the classical reasons for the granting of the writ of certiorari is alleged to exist in this case.

The questions whether respondent has utilized Lenoir Car Works to perform any of its non-delegable operational functions and has so dominated Lenoir Car Works as to render employees of the latter employees of respondent for purposes of the Federal Employers' Liability Act involve matters of degree which merely entail a review of the evidence and of the inferences to be drawn therefrom. This Court will not grant the writ for that purpose.

General Talking Pictures Corporation v. Western Electric Company, 304 U. S. 175.

There is a complete absence of a conflicting decision by any Court of Appeals or District Court, presumably because no one has heretofore thought that the employees of a purely manufacturing corporation could assert rights under the Federal Employers' Liability Act as employees of a "common carrier by railroad" merely by reason of the fact that a common carrier by railroad owned all of the capital stock of the manufacturing corporation and purchased some of its products.

Therefore, the only ground asserted for granting the writ of certiorari is that the decision below is erroneous, and we shall attempt to demonstrate that this ground is without merit.

The Decision Below Is Clearly Correct.

The issue involved and the determinative facts were stated by the District Judge in this language (R. 30-36):

> "The plaintiff in this case was employed as a wheel mounter by Lenoir Car Works, a Tennessee corpora-

tion. He claims injuries from silicosis contracted from silica dust permeating the foundry. But the question whether he had silicosis, and the amount of injury, are not reached in this phase of the case.

"The sole question here is whether defendant, Southern Railway Company (hereinafter referred to as Southern), which acquired the entire capital stock of Lenoir Car Works (referred to hereinafter as Lenoir) in 1904, the year of the latter's organization, so completely dominated Lenoir that the latter was but an adjunct, or instrumentality, of Southern. If it did, then the complainant would, for the purpose of this case, be an employee of Southern and would be entitled to recover under the Federal Employers Liability Act. Because there is a real question that Lenoir is but an instrumentality of Southern, the plaintiff, in order to protect his rights, has also brought suit in the State courts against Lenoir for Workmen's Compensation.

"The general rule is that stock ownership alone by one corporation of the stock of another does not thereby render the dominant corporation liable for the torts of the subsidiary unless the separate corporate existence of the subsidiary is a mere sham, or unless the control of the subsidiary is such that it is but an instrumentality or adjunct of the dominant corporation. **Sheridan v. Pan-American Refining**, 12 F. Supp. 81 (DCNY). The general rule is also stated in an Annotation appearing in 50 A. L. R. 611. See also **Kentucky Electric Power Co. v. Norton**, 93 Fed 2d 923, 926 (CCA 6). Whether the subsidiary is an instrumentality of the owner corporation is a question to be determined from all the surrounding circumstances. **Fletcher Cyclopedia, Corporations**, Sec. 43 (P. 157), Sec. 6222; **Berkey v. Third Ave. R. Co.**, 244 N. Y. 84, 50 A. L. R. 599 (opinion by Cardozo); **Cos-**

tan v. Manila Electric Co., 24 Fed. 2d 383, 384 (CCA 2). Items to be considered in reaching such a determination are common directorships, common officers, common fiscal set up, etc.

"The plaintiff relies upon the following circumstances:

"That all directors and officers of Lenoir are employees of Southern and live in Washington; that Southern owns all the stock of Lenoir except five qualifying shares; that between 1942 1957 Lenoir sold to Southern, or its affiliates, over 30 million dollars worth of its products while selling approximately four and a half million to outside purchasers; that all profits of Lenoir went to Southern; that all claims of Lenoir employees for accidents are handled by the Claim's office of Southern; that all litigation against Lenoir is handled by Southern's attorneys; that general accounting of Lenoir is handled in Washington by personnel of Southern; that the Railroad Retirement Board decided that employees of Lenoir were entitled to benefits under the Railroad Retirement Act because of the relationship between Lenoir and Southern; that Lenoir has the power of eminent domain; and that on May 13, 1904, the Board of Directors of Southern authorized the purchase of the entire capital stock of Lenoir.

"Our question is whether these factors would establish Lenoir as the mere creature of Southern. The defendant railroads company says that these matters are not controlling and, to sustain its position, emphasizes the following facts:

"That although Lenoir sells the majority of its products to Southern or its affiliates, it does not sell them exclusively and in the fifteen year period prior to the suit, sold twelve percent to other customers; that

Lenoir, maintains its offices and business in Lenoir City, Tennessee, although it concedes that the corporate and accounting offices are in Washington in a building owned by Southern; that the management of Lenoir is vested in a manager, Henry Marius, who has held the position continuously since July 1, 1945, is paid by Lenoir, and although he holds and votes the proxy of Southern at the annual stockholders meeting, he has no other connection with Southern; that never has any individual served at the same time as a Director of Lenoir and Southern; that the work of Lenoir is a specialty and in the last 20 years no official or supervising employee of Southern has by training, or experience, been in a position to direct or supervise the operation of such a business; that Southern has not purchased all its wheels, steel and brass castings from Lenoir, but has bought substantial amounts from others; that Southern has followed the custom in the trade as to price quotations and supplying scrap material in its dealings with Lenoir, and all sales to Southern have been upon the basis of a bid price or negotiated price; that in every case Southern obtains bids from several manufacturers and purchases from the lowest bidder; that the manager of Lenoir establishes the prices of all prospective purchases, including that of Southern; that the manager expects to make a profit and is not informed by Southern of bids of its competitors even when the prices are negotiated; that bids are revised sometimes, but never with knowledge of the bids of competitors; that all sales are the result of the business judgment of the Manager and not the result of threats, persuasion or intimidation by Southern; that at no time has any individual occupied the same official position in both companies with the exception of corporate and financial officials; that Lenoir has since

1949 been a duly qualified employer under the Tennessee Workmen's Compensation Law and with the exception of this and several similar suits has settled all claims made under and covered by the Tennessee Workmen's Compensation Law; that Lenoir maintains a separate bank account and has never intermingled its funds with those of Southern; that the companies keep separate books and Lenoir pays its own taxes; that Southern issues no passes to the manager or any other employee of Lenoir; that Lenoir owns no track or rolling stock, publishes no tariffs, files no reports with the Interstate Commerce Commission and uses no facilities or property jointly with Southern; that claims of employees are investigated and settled by the Claim Department of the Southern Railway System, which likewise defends claims litigation; that the general accounting of Lenoir is handled by the Accounting Department of the Southern Railway System, but local accounting is handled by Lenoir employees at Lenoir City; that salaries of employees of the System doing this general work are paid by Southern, but reimbursement of its fair proportionate part thereof is made by Lenoir and other members of the System at monthly intervals, and that the share of Lenoir is $2,000.00 monthly; that Lenoir makes separate collective bargaining agreements with its employees and there is no interchange of seniority between operations of Lenoir and the railroads or vice versa; that Lenoir has its own legal counsel in Lenoir City, selected by its manager in addition to the use it makes of the Legal Department of the System.

"Counsel have been commendably frank and candid in the pre-trial conferences and in answering interrogatories and filing exhibits. The factual data before the Court is not in conflict. The Court's responsibility

is to determine whether Lenoir is operated as a shaft for Southern, or as the instrumentality, or as an adjunct of its operation.

"The facts set forth above outline with singular sharpness the relation between the two companies. The Court finds the existence of two distinct operations. There is no evidence that Southern dictated the management of Lenoir. In fact, the evidence indicates that Henry Marins was in full control of the operation. He established prices. He handled all negotiations in collective bargaining agreements. Lenoir paid local taxes, had local counsel, maintained Workmen's Compensation. There is no evidence that Lenoir was run solely for the benefit of Southern. In fact, a substantial part if its requirements in the field of operation of Lenoir were bought elsewhere. Lenoir sold substantial quantities to other companies. It operated no rolling stock and had nothing to do with the transportation business."

Opinion of District Court, R. 30-36.

(a) **Lenoir Car Works is neither the alter ego, adjunct, subsidiary, agent or instrumentality of respondent, nor is it performing respondent's necessary functions and work.**

The single question here is whether the relationship between these two corporations is such as that employees of the subsidiary manufacturing corporation are in fact employees of the parent, and thus employees of a "common carrier by railroad." To entitle petitioner to recover, he must show that he was injured "while he is employed by such carrier" (45 U. S. C. 51). If petitioner could show that Lenoir Car Works was a common carrier by railroad, that might enlarge his rights against Lenoir Car Works, but that would create no cause of action against respondent. It is not enough that petitioner's work

created wheels and bearings, a portion of which were purchased by respondent and used in the repair of its locomotives and trains. That does not place petitioner in the status of one "employed by such carrier."

The opinion of this Court in **Southern Pacific Company v. Gileo, 351 U. S. 493**, gives no comfort to petitioner. There the plaintiff was employed as a moulder by a "common carrier by railroad", and engaged in the manufacture of car wheels. The question there was not whether he was employed by a "common carrier by rail" that fact was admitted. The question was whether his duties were "the furtherance of interstate or foreign commerce" (45 U. S. C. 51). The Court answered in the affirmative.

The Federal Employers' Liability Act itself does not define the words "employee" and "employed." However, it has uniformly been held that these words are used in this Act in their natural sense, and describe the conventional relationship of employer and employee.

Hull v. Philadelphia, etc., R. Company, 252 U. S. 475;
Dougall v. Spokane, etc., R. Company (C. A. 9), 207 F. (2d) 843, Certiorori denied, 347 U. S. 904;
Stevenson v. Lake Terminal R. Company (C. A. 6), 42 Fed. (2d) 357.

It is important to note that petitioner's effort to create an employer-employee relationship between himself and respondent is not for the purpose of fastening onto a parent corporation a liability of its failing or insolvent subsidiary, but rather of **creating rights** in petitioner that never existed before, and of fastening upon the stockholder parent a much greater liability than could ever have existed against Lenoir Car Works itself. To accomplish this result, a heavy duty rests upon him.

"It is the general rule that a corporate entity must be observed unless unusual conditions exist which

require the courts to look behind the form to the substance."

Consumers Construction Co. v. Commissioner, 94 F. 2d 731 (C. C. A. 1).

"As a general rule a corporation and its stockholders are deemed separate entities, and this is true in respect of tax problems. Of course, the rule is subject to the qualification that the separate entity may be disregarded in exceptional situations where it would otherwise present an obstacle to the due protection or enforcement of public or private rights."

New Colonial, Inc., Co. v. Helvering, 292 U. S. 435, 442.

What then are the "exceptional situations" which must exist before it is permissible to depart from the normal course and ignore the separate existence of a corporation? In the leading case of **In Re Watertown Paper Co. (C. C. A. 2), 169 F. 252, 256,** those "exceptional situations" were defined in language frequently quoted with approval by other Federal Courts, as follows:

"(1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

In the instant case the first situation described above has no application, because it cannot be contended that it is necessary to ignore the corporate existence of Lenoir Car Works in order to "circumvent fraud." Is it fraudulent to pay one moulder for the loss of an arm under the Federal Employers' Liability Act and pay another moulder for the same injury under the Tennessee Workmen's Com-

pefisation? If so, was the Congress of the United States or the Legislature of Tennessee the guilty culprit?

There is no intimation that anything has ever been done or said by Southern Railway Company or Lenoir Car Works to mislead the public, the public officials or employees of Lenoir Car Works, to believe that employees of Lenoir Car Works were employees of Southern Railway Company.

If petitioner would have the Court "circumvent fraud" by disregarding the corporate identity of Lenoir Car Works, when was the fraud committed? If Lenoir Car Works has such identity, it originated upon its incorporation in 1904. The Federal Employers' Liability Act had its birth in 1908. The Tennessee Workmen's Compensation Law was enacted in 1919. It is hardly conceivable that an enactment of Congress in 1908, or of the Tennessee Legislature in 1919, could render fraudulent a perfectly legitimate deal committed in 1904.

Petitioner asserts that the separate corporate entity of Lenoir Car Works should be disregarded, because to do so would serve "the policy of the law." There is no "policy of the law" that requires that petitioner have recourse for his alleged injury under the Federal Employers' Liability Act rather than under the Tennessee Workmen's Compensation Law. There is no "policy of the law" that requires that determination whether employees of a manufacturing corporation are covered by the Federal Act or the State Act be dependent on who are the stockholders of the manufacturing corporation. It follows, therefore, that no justification for disregard of the separate corporate identity of Lenoir Car Works can be found on any theory of enforcing the public policy or "policy of the law" or of preventing fraud or injustice.

The only inquiry that remains is whether Lenoir Car Works has been so organized and controlled, and its affairs

so confluted, as to make it "merely an instrumentality or alter ego" of Southern Railway Company.

In **Commerce Trust Company v. Woodbury (C. C. A. 8), 77 F. 2d 478, 487, certiorari denied 296 U. S. 614,** the Court said:

> "Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from the stockholders, whether they be one or more. In re Collins (C. C. A.) 75 F. (2d) 62; Wilson v. Brooks (D. C.), 52 F. (2d) 692; Majestic Co. v. Orpheum Circuit, Inc. (C. C. A.), 21 F. (2d) 720; Owl Fumigating Corp. v. California Cyanide Co. (D. C.), 24 F. (2d) 718, loc. cit. 719; Pullman's Palace Car Co. v. Missouri Pacific Ry. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. Ed. 499. Likewise, we think it must be conceded that neither ownership of all of the stock of one corporation by another, nor the identity of officers in one with officers in another, creates a merger of the two corporations into a single entity, or makes one either the principal or agent of the other. Owl Fumigating Corporation v. Cyanide Co. (D. C.), 24 F. (2d) 718; Corsicana Nat. Bank v. Johnson, 251 U. S. 68, 40 S. Ct. 82, 64 L. E. 141; Marsch v. Railroad, 233 Mass. 483, 120 N. E. 12; Richmond, etc., Co. v. Richmond, etc., Ry. Co. (C. C. A.), 68 F. 195, 34 L. R. A. 625. But notwithstanding such situation and such intimacy of relation, the corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution and when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud."

The Sixth Circuit Court of Appeals has said this:

> "On the other hand, it is likewise well settled that a corporation is ordinarily an entity, separate and

apart from its stockholders, and mere ownership of all the stock of one corporation by another, and the identity of officers of one with officers of another, are not alone sufficient to create identity of corporate interest between the two companies or to create the relation of principal and agent or to create a representative or fiduciary relationship between the two. If such stock ownership and potential control be resorted to only for the purpose of normally participating in the affairs of the subsidiary corporation in a manner usual to stockholders and not for the purpose of taking some unfair advantage of the subsidiary or using it as a mere adjunct to the main corporation or as a subterfuge to justify wrongdoing, their identity as separate corporations will not be disregarded but their respective rights when dealing with each other in respect to their separate property will be recognized and maintained. The extent of stock ownership and mere potential control of one company over another has never been regarded as the determinating factor in the consideration of such cases. Something must be disclosed to indicate the exercise of undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one. Otherwise, the rights of the separate corporations in respect to their corporate property must be governed by the rules applicable in ordinary cases."

Kentucky Electric Power Co. v. Norton Coal Mining Co., 93 F. 2d 923, 926.

Petitioner cites the case of **Chicago, etc., R. Co. v. Minneapolis Civic Association, 247 U. S. 490**, as a classic example of when control by the parent corporation of its subsidiary becomes such as to require disregard of the separate corporate entity of the subsidiary. That case by its context supports the position of [illegible]

There two trunk line railroads organized a terminal company which they jointly owned through equal stock ownership. The railroad companies entered into a contract with the terminal company whereby the management functions of the terminal company were vested in a "managing committee" composed of one official of each of the railroad companies. The tracks of the terminal company were treated by the railroad companies as a part of their own terminals for all purposes except that a separate switching charge was assessed on traffic moving over its lines, although no such charge was made on traffic moving over the railroad companies' own terminal tracks. The Minnesota Commission ordered the abolition of the separate charge on the ground that the tracks of the terminal company were in reality a part of the terminals of the railroad companies. The Court sustained this ruling, using this language:

> "With the facts thus summarized, it is difficult to conceive of a plan for the control of a jointly owned company and for the operation of a jointly owned track more complete than this one is and it is sheer sophistry to argue that, because it is technically a separate legal entity, the Eastern Company is an independent public carrier, free in the conduct of its business from the control of the two companies which own it and therefore free to impose separate carriage charges upon the public.
>
> . . . . . .
>
> "Much emphasis is laid upon statements made in various decisions of this Court that ownership, above of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two corporations, and it is argued

that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Ocala companies.

"While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to, not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies."

Chicago, etc., R. Co. v. Minneapolis Assn., supra, pp. 498, 501

The contrast between that case and the instant case is striking. There the subsidiary was a mere shell, without any separate functions or life of its own. It had contracted away its vital corporate powers and was directly managed, controlled and operated by the "managing committee" composed of two corporate officers of the proprietary companies. It had no separate management of its own. The sole excuse for its existence was a mere subterfuge in order to enable the proprietary companies to assess extra charges against industries located on its tracks. The situation now under consideration is entirely different. Lenoir Car Works conducts no part of the business of Southern Railway Company; it is not a carrier, but a manufacturing plant. It is managed by its own Manager, whom it pays, and who has no connection with Southern Railway Company. Lenoir Car Works has

contracted away none of its corporate powers. These powers are exercised in the normal fashion through its Board of Directors. **It keeps its own separate accounts, owns its own property, pays its own obligations, and has its own funds. Its transactions with Southern Railway Company are negotiated at arm's length.**

More than all this, whereas in the Minneapolis case the subsidiary corporation was performing for its owners a part of their non-delegable franchised duties, Lenoir Car Works was performing none of these for Southern Railway Company. A railroad company is free to manufacture equipment parts in its own shops if as a matter of business judgment it so desires.

> **Norfolk & Western Ry. Co. v. United States, 287 U. S. 134, 143;**
>
> **Jacob Shamberg v. D. L. & W. R. R. Co., 4 I. C. C. 630, 660;**
>
> **Virginian Railway v. Federation, 300 U. S. 515, 554.**

However, the manufacture of such equipment is no part of the franchised duties of a railroad corporation which it is required to perform. It may "farm out" such manufacture to complete strangers or it may organize a subsidiary corporation to perform it, and in neither event can any ulterior motive be attributed to it, nor is any public policy offended.

It is readily conceded that if Southern Railway Company itself, in its own shops, and with its own employees should undertake to manufacture such equipment for its own use in the maintenance and repair of its rolling stock, the employees so engaged would be covered by the Act. This result would follow not alone from the character of the work being performed by such employees. It would follow from the **dual** factors that the employees' duties were in furtherance of inter-state commerce, and that such

employees would be in the employ of a "**common carrier by railroad.**"

We have no fault to find with the line of cases relied upon by petitioner, which we shall presently discuss, to the effect that a "common carrier by railroad" cannot "farm out" portions of its franchised, non-delegable transportation duties and thus exclude from coverage under the Federal Employers' Liability Act the employees engaged in the performance of such duties. Those cases simply have no application to the case at bar.

Petitioner cites the case of **Sinkler v. Missouri Pacific R. Co., 356 U. S. 326, 2 L. Ed. 2d 799.** That case supports the position of respondent. There the plaintiff was employed directly by the Missouri Pacific R. Company, hence was an employee of a "common carrier by railroad." He was injured through the negligence of employees of a terminal railway company, and his right of recovery against his employer depended upon a finding that the employees of the terminal company whose negligence injured him were **agents** of plaintiff's employer, Missouri Pacific R. Co. (Here it should be pointed out that under the plain language of the Act it is only "**employees**" who are covered. However, such employees may recover from their employer if injury results from the negligence of "**any of the officers, agents, or employees of such carrier.**" Obviously the words "officers," "agents" and "employees" cannot mean one and the same thing.) The Terminal Company was organized as a separate corporation by several railway companies for the purpose of owning and operating the Union Station at Houston, Texas, and of performing switching operations in the yards of that station. The defendant Missouri Pacific R. Company entered into a contract with the Terminal Company, by which, for a consideration, the Terminal Company undertook to switch Missouri Pacific's cars in said yard. The

Missouri Pacific Company was one of the principal stockholders of the Terminal Company. Under these circumstances, the Court did not hold, as is contended by petitioner, that employees of the Terminal Company were to be treated in law as employees of Missouri Pacific. What the Court did hold was that the **Terminal Company** was an **agent** of Missouri Pacific while engaged in switching cars for Missouri Pacific that accordingly plaintiff, who was an employee of Missouri Pacific, was injured through the negligence of an **agent** of Missouri Pacific, hence entitled to recover under the Act. This language of the Court is enlightening:

> "It should first be noted that 'some common-law jurisdictions recognized an exception to the general rule of respondeat superior when a railroad engaged an independent contractor **to perform operational activities required to carry out the franchise.** In that circumstance the railroad was held liable for the fault of the servants of the independent contractor even though the railroad did not control the manner or method by which the latter did the contracted work. Different theories supported this liability, depending upon whether the person injured was an employee of the railroad, a passenger, or a third party. In the case of the employee the theory was phrased as a non-delegable duty of care springing from the contractual relationship between the employer and employee; Floody v. Great Northern R. Co., 102 Minn. 81, 112 N. W. 875, 13 L. R. A. (N. S.) 1196, or as a duty springing from the franchise to see that no wrong is done through the exercise by other persons of chartered powers. North Chicago Street R. Co. v. Dodgeon, 184 Ill. 477, 56 N. E. 796. However phrased, substantial authority in common law decisions supported recovery by the railroad employee from his employer for injuries caused by the fault of employees

of an independent contractor performing a part of the employer's railroad operations.

"However, in interpreting the FELA, we need not depend upon common law principles of liability. This statute, an avowed departure from the rules of the common law, cf. Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 507-509, 1 L. Ed. (2d) 493, 499-501, 77 S. Ct. 443, was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A. L. R. 967. * * *

"Thus while the common law had generally regarded the torts of fellow servants as separate and distinct from the torts of the employer, holding the latter responsible only for his own torts, it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor. Hence a railroad worker may recover from his employer for an injury caused in whole or in part by a fellow worker, not because the employer is himself to blame, but because justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with his in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be endangered. If this standard is not met and injury results, the worker is compensated in damages.

"This broad purpose controls our decision in determining whether the Belt Railway and its switching crew were 'agents' of the respondent within the mean-

ing of the section. Plainly an accommodating scope must be given to the word 'agents' to give vitality to the standard governing the liability of carriers to their workers injured on the job. See Kernan v. American Dredging Co., 355 U. S. at 431, 432, 438, 439.

"In the present case the respondent, rather than doing the necessary switching incident to its business in the Houston Terminal area, arranged that the Belt Railway should supply the crews and equipment to perform this operation on its behalf. But the evidence clearly establishes that the respondent's trains, when under the control of the Belt Railway's switching crews, were being handled to further the task of the respondent's enterprise. While engaged in switching and handling respondent's cars and trains about the terminal area, the Belt Railway employees on the job were, for the purposes of the FELA, as much a part of the respondent's total enterprise as was the petitioner while engaged in his regular work on the respondent's car.

"It is manifest that the corporate autonomy of the Belt Railway, and its freedom from detailed supervision of its operations by respondent, are irrelevant inasmuch as the switching crew of the Belt Railway Company at the moment of the collision in the station was engaged in furthering the operational activities of respondent. **We therefore hold that when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract operational activities of his employer, such others are 'agents' of the employer within the meaning of Sec. 1 of FELA.**" (Emphasis added.)

Sinkler v. Missouri Pacific R. Co., supra, pp. 328-332

It is of the utmost significance that Mr. Justice Brennan, who delivered the majority opinion in the **Sinkler**

case, supra, when discussing the meaning of the word "agents", appended a footnote as follows:

> "It may be significant that there was omitted from the section as enacted the language in the original bills which would have imposed liability upon a carrier for the fault 'of any other person subject to its control.' Hearings before the Senate Committee on Education and Labor on S. 5307, 60th Cong., 1st Sess., 3, 34; Hearings before the House Committee on the Judiciary on HR 17036, 60th Cong., 1st Sess., 3, 34."

By this footnote Mr. Justice Brennan is pointing out that, as introduced in Congress, FELA would have made Southern Railway Company liable for injury to its own employees resulting from the negligence of an employee of a fully owned subsidiary, such as Lenoir Car Works, but that Congress did not see fit to extend liability that far. The Sinkler case, supra, is therefore no authority for the proposition that the separate corporate entity of a wholly owned manufacturing corporation producing merchandise designed for use in the railroad industry is to be disregarded to the extent that for the purpose of treating employees of the manufacturing corporation as employees of the owning railway corporation so as to afford them an extraordinary remedy that was unknown to the common law.

The two cases we are presently to discuss, involved respondent Southern Railway Company. They both treat with the circumstances under which the separate corporate entity of its subsidiaries may or may not be disregarded for purpose of fixing tort liability on Southern Railway Company. These cases will demonstrate without any equivocation that there is no justification for petitioner's position in the case at bar. The cases are Southern Railway Company v. Crosby, 201 F. 2d 878, and Shields v. Atlantic Coast Line Railroad Company and Southern Rail-

way Company, 220 F. 2d 242. In the first case the separate corporate entity of the subsidiary was disregarded and in the latter its integrity was maintained.

In **Southern Railway Company v. Crosby**, supra, a brakeman in the employ of Southern Railway Company was killed in the derailment of a freight train on which he was working. His Administratrix sued his employer, Southern Railway Company, for his death. The defense was that Crosby was not an employee of defendant Southern Railway Company, but was rather an employee of the Yadkin Railroad Company. The relationship between the defendant Southern Railway Company and the Yadkin Railroad Company was described by Judge Parker in this language:

> "The relationship of defendant to the Yadkin Railroad Company was entirely different from that which existed between defendant and affiliated railroad companies, such as the Alabama Great Southern and the Cincinnati, New Orleans and Texas Pacific, which compose with defendant the Southern Railway System. The Yadkin was one of a group of short line railroads, controlled by defendant through majority stock ownership, whose officers were officers of defendant, whose operation was integrated with that of defendant and whose trains were run by employees of defendant under defendant's control. Prior to 1946, there was no attempt to separate the affairs of these short line railroads from the other operations of defendant. They were operated by defendant and their operations were covered by defendant in its report to the Interstate Commerce Commission. Beginning with 1946 separate reports were required from these roads, which defendant operated but did not lease, and defendant accordingly caused separate reports to be made for them showing their separate earnings and expenses; but these reports were made

by officers of the short line roads, who were also officers of the defendant, and represented operations carried on by employees of defendant. The management of the affairs of these roads was in the hands of a vice president in charge of operations, who was also an assistant vice president of defendant, who had an office in defendant's station in Charlotte, N. C., which was not on the line of any of them, and whose salary was paid by defendant, although defendant was reimbursed for it by the short line roads. A single dispatcher at Hickory, N. C., more than fifty miles from the nearest point of the Yadkin, issued the orders for the running of all of their trains.

"The Yadkin owned the 35 miles of track between Salisbury and Albemarle, but, as stated, it owned no rolling stock, although it leased two locomotives from the defendant. The total of its assets as shown by the books in 1950 was only $2,198,065 and it had an accumulated deficit of $2,149,880, all of which was represented by indebtedness to defendant, which owned all of its bonds and all of its stock except about one fourth of the original subscription which was held by a county and certain townships which subscribed for it more than half a century ago.

"The trains over the line of the Yadkin were operated by engineers and trainmen who were paid for the service by checks issued by the Yadkin, but who were employed by defendant, were assigned to the job by defendant, worked under the rules of defendant and were subject to defendant's discipline and control. They were employed in the defendant's Charlotte Division, were required before their employment to acquaint themselves with the Yadkin road bed by riding over it, were granted vacations by defendant even when running exclusively on the Yadkin line, had the right as employees of the Charlotte

Division in the exercise of seniority to 'bid in' runs on the Yadkin and when running on the Yadkin to exercise seniority to bid in runs on the main line, and as employees on the 'extra board' of the defendant at Greeneville, S. C., were subject to assignment to runs on the Yadkin. Trains from Salisbury to Albemarle departed from defendant's terminal yards at Spencer and their departure was subject to the control of defendant's Spencer employees.

"Crosby lived at Greeneville, S. C. and was one of the employees of defendant in its Charlotte Division. He was assigned by defendant's dispatcher to the service in which he lost his life because his name was on defendant's 'extra board' at Greeneville and he was called by defendant's call boy to the service. He had no option with respect to accepting or not accepting the assignment, and defendant had made this very clear in disciplining others of its employees who had sought to avoid similar service. The labor brotherhood of which Crosby was a member had negotiated an agreement regulating wages and conditions of work on the Yadkin as well as on the Southern and the other roads controlled by it; but there was nothing in this agreement which gave consent of any Southern employee to service on the Yadkin or took him from under the protection and control of the Southern while working on the line of the Yadkin under the Southern's orders."

Southern Railway Company v. Crosby, supra, pp. 881-2.

After thus describing the relationship of the parties, Judge Parker said:

"In the light of this evidence we think that the judge below was clearly right in holding that the operations on the line of the Yadkin were nothing

more than a part of the operations of the defendant carried on through its agents and servants, and that defendant cannot escape liability for their negligence because the earnings and expenses of the Yadkin were kept separate from defendant's other expenses with separate payment to the employees for services performed on this line. Crosby was employed by defendant; he was assigned by defendant to work on the Yadkin line, an assignment he could not refuse; and he was injured as a result of negligence in the operations which defendant's employees were carrying on over a line of railroad which it controlled and operated as completely as it did its own main line. There is no reason in law or in common sense why the court should not look at the realities of the situation or why it should be blinded by the forms which defendant adopted in carrying on the business involved. * * *

* * * * * * *

"The case presented here is not that of one railroad which lends an employee to another for the purpose of the other's business, but of a dominant railroad which controls and operates the business of a subsidiary and uses its own employees for that purpose. The business handled by the train movement which resulted in Crosby's death was business of the defendant and the movement itself was a part of that business. Defendant may not escape liability for torts committed in carrying on the business merely because the cost thereof is allocated to the corporation that owns the track over which the movement was effected."

Southern Railway Company v. Crosby, supra, p. 882.

In the **Shields case**, supra, the plaintiff, who occupied the status of an invitee, was injured as the result of the

breaking when he stepped upon it of a dome step on a tank car which he had been engaged to unload. He sued Atlantic Coast Line as the delivering carrier, and Southern Railway Company as the originating carrier, his cause of action being based both on common law negligence and an alleged violation of the Safety Appliance Act. The originating carrier was actually the New Orleans & North Eastern Railroad Company, a wholly owned subsidiary of Southern Railway Company, and it was on that theory that Southern was sued. The Court sustained Southern's motion for peremptory instructions and the suit was dismissed as to it and judgment was rendered against Atlantic Coast Line. Both parties appealed to the Fifth Circuit, the plaintiff appealing from the action of the Court in dismissing his suit as to Southern Railway Company. The Court of Appeals reversed the case as to Atlantic Coast Line, holding that the trial Judge had erroneously submitted the case to the jury under the Safety Appliance Act. The judgment of dismissal as to Southern Railway Company was affirmed. On this issue the Court said:

> "On the merits, however, we agree with Southern that, under the undisputed facts, Southern was not the alter ego of the N. O. and N. E. Railroad Company; that it was not, and could not be, sued as the original carrier; and that the district judge was right in instructing a verdict in its favor.
>
> "No useful purpose will be served by setting out in detail the evidence on which this conclusion is based. It suffices to say that while Southern, as the holding company, has the same general executive officers as its subsidiary, the other employees are not the same. The Southern Railway, as such, does not run or operate the N. O. & N. E. Railroad Company, and it had nothing to do with the handling of the car in question, as originating carrier or otherwise. A consideration of the cases on which appellant re-

lies for his different view shows that they do not, as applied to the facts of this case, at all support it. This is particularly so with respect to the case on which he mainly relies, Southern Railway Co. v. Crosby, 4 Cir., 201 F. 2d 878, 36 A. L. R. 2d 1186, in which the facts were wholly different.

"Without setting out the facts of this case, it is sufficient to say that to hold under them that the Southern Railway Company may be sued as the operator of the N. O. and N. E. Railroad Company, and therefore, the originating carrier, would require a holding in substance that a holding company is responsible simply, because it is a holding company, as the actor in the routine, the ordinary, activities of its wholly owned subsidiary in and about the business which the subsidiary was incorporated to, and does actively own and operate."

Atlantic Coast Line R. Co. v. Shields, supra, p. 246.

It is interesting to note that in the **Shields case**, supra, the plaintiff petitioned this Court for certiorari with respect to the reversal as to Atlantic Coast Line, but he did not seek a review by this Court of the dismissal as to Southern Railway Company.

Another group of cases relied on by petitioner relates to circumstances under which employees of so called "independent contractors" performing transportation services for a common carrier by railroad may be deemed employees of the common carrier and thus entitled to the benefits of the Federal Employers' Liability Act. These cases can have no application to the case at bar, for, as already pointed out, Lenoir Car Works is performing no transportation function or operational function for Southern Railway Company. This group of cases does, however, point

up the fact that in these "independent contractor" situations a very large degree of supervision and control over the details of the work being performed by the contractor is necessary before the contractor's employees will be treated as the carrier's employees. These cases re-emphasize the position which we have heretofore taken that the words "employee" and "employed" are used in the Federal Employers' Liability Act in their conventional sense.

(b) Lenoir's incorporation prior to the enactment of the Federal Employers' Liability Act is significant.

Reverting again to the position of petitioner that to recognize the integrity of the separate corporate existence of Lenoir Car Works would defeat the policy of Federal Employers' Liability Act, we point out that Lenoir Car Works was incorporated in 1904, and has been in continuous existence since that time, whereas the Federal Employers' Liability Act was not enacted until 1908. Since the separate corporate existence of Lenoir Car Works antedates enactment of the Federal Employers' Liability Act, it cannot be held that its creation and continued existence were conceived as a device or scheme to evade or thwart the policy of the law. **Gaulden v. Southern Pacific Company, 78 F. Supp. 651, 174 F. 2d 1022.**

In the **Gaulden case**, supra, the plaintiff, an employee of Pacific Fruit Express Company, filed a suit against both Southern Pacific Company and Pacific Fruit Express Company under the Federal Employers' Liability Act to recover damages for personal injuries sustained by him while engaged in loading ice into a refrigeration car belonging to the Express Company. The Express Company was incorporated in 1906 for the purpose of owning and renting to railroads refrigerator cars. Its sole stockholders were Southern Pacific Company and Union Pacific Railroad Company, both common carriers by railroad. Its Directors were

persons employed by the owning railroad. Liability was sought to be imposed upon Southern Pacific Company on the theory that the Express Company was its alter ego. In rejecting this theory the Court said:

"It is also urged by the plaintiff that the corporate organization of the Pacific Fruit Express Company and its relation to the Southern Pacific Company so identifies and integrates it with that railroad as to make it as well a common carrier by rail. It is true that the Pacific Fruit Express Company came into being with the prime purpose of furthering the transportation enterprise of its two stockholder railroads. It may be said that the two railroad companies could themselves well have performed the functions of Pacific Fruit Express Company as an integral part of their own common carrier business. But, absent trickery or device, this factor cannot in law make the Pacific Fruit Express Company the alter ego of the Southern Pacific Company. Ellis v. Interstate Commerce Com., supra (237 U. S. 434); United States v. Elgin, Joliet & Eastern R. R. Co., supra (298 U. S. 492).

"Section 5 of the Federal Employers' Liability Act, 45 U. S. C. A. 55, provides as follows: 'Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.'

"The creation of the Pacific Fruit Express Company, although intended to further the transportation business of its two railroad stockholders, occurred before the Act was passed. There is therefore no basis for a charge that creation of Pacific Fruit Express Company violated Section 5. Chicago, R. I. & P. R. Co. v. Bond, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735; Robinson v. B. & O., 237 U. S. 84, 35 S. Ct. 491,

59 L. Ed. 849; Wells Fargo v. Taylor, supra (254 U. S. 175, 65 L. Ed. 205).

Gaulden v. Southern Pacific Company, supra, p. 655.

At 174 F. 2d 1022, the Court of Appeals for the Ninth Circuit adopted in toto the opinion of the District Judge in the **Gaulden case**.

Petitioner says that this Court held otherwise in **Philadelphia, etc., R. Co. v. Shubert, 224 U. S. 603**. That case holds that **45 U. S. C. 55** invalidated an agreement between the railroad and its employees, existing on the effective date of the accident, which provided that acceptance by an injured employee of funds from a "benefit plan" maintained jointly by the employer and the employees, would release the railroad company from liability. That is not what the petitioner is asking the Court to do here. He does not ask the Court to hold that the separate corporate existence of Lenoir Car Works or its Corporate Charter are invalid as repugnant to Federal Employers' Liability Act. He is asking the Court to hold that the separate corporate existence of Lenoir Car Works (which antedated the enactment of Federal Employers' Liability Act) was created as a scheme or device to "defeat the policy of the law", and should be disregarded for that reason. The **Shubert case** does not justify such a holding.

(c) **The findings of the Examiner of the Railroad Retirement Board.**

Petitioner also contends that great significance should be attached to the fact that in 1938 the Railroad Retirement Board held that Lenoir Car Works was subject to the provisions of the Railroad Retirement Act (45 U. S. C. 228a, et seq.). This decision has no significance whatever insofar as the present suit is concerned.

Employers subject to the Federal Employers' Liability Act are "common carriers by railroad". Employers subject to the Railroad Retirement Act are defined to be "any carrier (as defined in sub-section (m) of this section) and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facilities or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *" (45 U. S. C. 228a(a).

On June 10, 1938, the Railroad Retirement Board entered an order directing that evidence be heard on three issues, namely:

"1. Has Lenoir Car Works been owned or controlled by Southern Railway from the date of organization of Lenoir Car Works to the present time?

"2. Has Lenoir Car Works from the date of its organization to the present time operated any equipment or facilities or performed any service in connection with the transportation of passengers or property by railroad?

"3. Has Southern Railway from the date of organization of Lenoir Car Works to the present time so disregarded the corporate entity of Lenoir Car Works as to constitute the employees of Lenoir Car Works the employees of Southern Railway?"

A hearing was had on said issues, voluminous evidence was introduced and a decision was rendered. It was made to appear that until about 1930, Lenoir Car Works, in addition to its manufacturing activities, had been engaged in rebuilding and repairing freight cars for Southern Railway Company, and at the time of the hearing had stand-by facilities for that purpose that were available when needed. Based on this evidence, the Railroad Retirement

Board determined on the first issue that Southern Railway Company "owned" Lenoir Car Works by reason of its one hundred percent stock ownership, and that Lenoir Car Works had performed a "service in connection with the transportation" for Southern Railway Company by repairing and rebuilding freight cars, and accordingly that Lenoir Car Works was an "employer" within the terms of the Railroad Retirement Act, and, as such, was required to pay payroll taxes to the Railroad Retirement Board rather than to the Social Security Board.

With respect to the third issue, that was the subject of the Railroad Retirement Board hearing, the Board's Examiner reported as follows:

> "In view of the determination here made on the first two issues, no determination has been made and no opinion is expressed on the third question whether Southern has so disregarded the corporate entity of Lenoir as to constitute Lenoir's employees the employees of Southern."

In other words, the Railroad Retirement Board specifically declined, even on the factual situation then existing, to adjudge that employees of Lenoir Car Works were in fact employees of Southern Railway Company. It merely adjudged that Lenoir Car Works was an "employer" within the meaning of the Railroad Retirement Act, and, as such, was required to pay taxes to the Retirement Board on the payrolls of its employees. Had that decision been in any way pertinent to petitioner's case, the decision would have been that Southern Railway Company was the employer of the men at Lenoir City, and, as such, was required to pay payroll taxes on their wages.

The decision of the Railroad Retirement Board is of no significance for the further reason that shortly after that decision was rendered, Lenoir Car Works completed

divested itself of all facilities and personnel for the repair and rebuilding of freight cars, and for the past twenty years has limited its activities to the manufacture of articles suitable for the railroad industry, which articles meet the specifications and requirements of both Southern Railway Company and the Association of American Railroads, and are and always have been available for purchase by any railway company desiring them.

(d) Respondent did not exercise such control over Lenoir Car Works as to require a determination that respondent is the employer of petitioner within the meaning of the Federal Employers' Liability Act.

The facts relating to this issue were found by the District Court in this language:

> "The facts set forth above outline with singular sharpness the relation between the two companies. The Court finds the existence of two distinct operations. There is no evidence that Southern dictated the management of Lenoir. In fact, the evidence indicates that Henry Marius was in full control of the operation. He established prices. He handled all negotiations in collective bargaining agreements. Lenoir paid local taxes, had local counsel, maintained Workmen's Compensation. There is no evidence that Lenoir was run solely for the benefit of Southern. In fact, a substantial part of its requirements in the field of operation of Lenoir were bought elsewhere. Lenoir sold substantial quantities to other companies. It operated no rolling stock and had nothing to do with the transportation business." (R. 35)

After quoting an excerpt from the opinion of the Court in **Kentucky Electric Power Company v. Norton Coal Mining Company (CA 6), 93 F. 2d 923**, the District Judge then concluded:

"This excerpt from the Kentucky Electric Power case was quoted with approval in a footnote to the case of Taylor v. Standard Gas & Electric Company, 96 Fed. 2d 693 (CCA 10). In that case the Court in considering the indicia of control quoted at length from Powell on Parent and Subsidiary Corporations:

> "'There is respectable authority for the proposition that to justify the application of the instrumentality rule between parent and subsidiary corporation, there must be present in addition to the elements of control through stock ownership and common directorates and officers, elements of fraud or wrongdoing on the part of the parent corporation to the detriment of the subsidiary and third persons in their relations with the subsidiary.
>
> "'Sections 5 and 6 of Powell on Parent and Subsidiary Corporations, in part, read:
>
> "'The Instrumentality Rule, in its shortest form, may now be stated:
>
> "'So far as the question of control alone is concerned, the parent corporation will be responsible for the obligations of its subsidiary when its control has been exercised to such a degree that the subsidiary has become its mere instrumentality.
>
> "'The Instrumentality Rule is recognized in all jurisdictions in this country and our problem therefore is to determine the circumstances which render the subsidiary an "instrumentality" within the meaning of the decisions. This is primarily a question of fact and of degree.
>
> "'The circumstances rendering the subsidiary an instrumentality. It is manifestly impossible

to catalogue the infinite variations of fact that can arise but there are certain common circumstances which are important and which, if present in the proper combinations, are controlling.

"These are as follows:

"(a) The parent corporation owns all or most of the capital stock of the subsidiary.

"(b) The parent and subsidiary corporations have common directors or officers.

"(c) The parent corporation finances the subsidiary.

"(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

"(e) The subsidiary has grossly inadequate capital.

"(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

"(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

"(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

"(i) The parent corporation uses the property of the subsidiary as its own.

"(j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

"(k) The formal legal requirements of the subsidiary are not observed.'

"In the case at bar only two of the eleven listed indicia occur, namely, the ownership of most of the capital stock of Lenoir by Southern, and possibly subscription by Southern to the capital stock of Lenoir. In our opinion the principles of the Kentucky Electric Power case apply here, and when applied we conclude that the control of Southern over Lenoir was not such as to constitute the latter an adjunct of 'Southern'" (R. 39-40).

This conclusion is supported by **Kentucky Electric Power Company v. Norton Coal Mining Company (C. A. 6), 93 Fed. (2d) 923; Atlantic Coast Line v. Shields (C. A. 5), 220 Fed. (2d) 242,** and **Taylor v. Standard Gas & Electric Company (C. A. 10), 96 Fed. (2d) 693.**

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CLYDE W. KEY,
Bank of Knoxville Building,
Knoxville, Tennessee,
Counsel for Respondent.

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